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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

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|---|---|
| **STATE OF IDAHO,**<br><br>**Plaintiff,**<br><br>**V.**<br><br>**BRYAN C. KOHBERGER,**<br><br>**Defendant.** | **CASE NUMBER CR01-24-31665**<br><br>**DEFENDANT'S OBJECTION TO STATE'S MOTION IN LIMINE**<br><br>**RE: TEXT MESSAGES AND TESTIMONY** |

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record and Objects to the State's Motion in Limine to admit text messaging as requested in its motion. Mr. Kohberger's Objection is grounded in his Constitutional rights of a fair trial, due process and

confrontation of evidence as guaranteed to him in the 5th 6th and 14th Amendments to the United States Constitution and Article I section 13 of the Idaho Constitution.

The State is seeking a broad scope of cell phone records for two stated purposes: one is to establish a timeline and the other is for the truth of the statements contained in the record. The span of time the state seeks to encompass is about a 10 hour time frame. The State indicates the initial text is the beginning of the time frame at 2:10 am and that text is not offered for the truth of the matter. Similarly, at the end of the time frame is a text from the university of Idaho at 1:04 pm. The State grounds its requests in the rules of evidence and a previous decision by Judge Judge.

**Law of the Case**

The State relies on Judge Judge's conclusion in Mr. Kohberger's challenge to the Grand Jury Indictment. However, that decision does not bind this court. The law of the case doctrine applies "where an appellate court pronounces a 'principle of law necessary to the decision.'" *State v.* Garcia 516 P.3d 578, 584 Idaho Supreme Court (2022) (quoting *Regan v. Owen, 163 Idaho 359, 363, 413 P.3d 759, 763.* When considering whether or not the text messaging is either an Excited Utterance or a Present Sense Impression this court will have the benefit of additional information than was available previously. Even if the court determined Judge Judge's decision was the law of the case this court has discretion to hear and decide the issues presented before the court. *State v. Hawkins* 155 Idaho 69, 72, 305 P.3d 513, 516 (2013). The trial court "discretion to change its own pretrial rulings, especially evidentiary rulings." *State v. Thorngren,* 149 Idaho 729, 736, 240 P.3d 575, 582 (2010).

The State seeks admission of certain texts, for the truth of the matter asserted as exceptions to the rule against hearsay.

**Excited Utterance**

> "… has two requirements: (1) an occurrence or event sufficiently startling to render inoperative the normal reflective thought process of an observer; and (2) the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. *Parker,* 112 Idaho at 4, 730 P.2d at 924 (quoting E. Cleary, *McCormick on Evidence,* § 297 (3d ed.1984)). We consider the totality of the circumstances including: "the amount of time that elapsed between the startling event and the statement, the nature of the condition or event, the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or made in response to a question." *State v. Hansen,* 133 Idaho 323, 325, 986 P.2d 346, 348 (Ct.App.1999) (citing 31 Michael H. Graham, *Federal Practice and Procedure* § 6753, at 275-76 (Interim ed.1997)). *State V Field* 144 Idaho 559, 568, 165 P.3d 273, 282 (2007).

**Present Sense Impression**

Although the rule does not expressly state, factors of trustworthiness and necessity play a large role in a trial court's decision whether to admit a declarant's expression of his state of mind or whether to exclude it under I.R.E. 403, as well as in the decision whether to admit or exclude the content of additional statements accompanying that expression. *See* 2 McCORMICK ON EVIDENCE § 267-270, 273 (Kenneth S. Broun ed.) (6th ed. 2006).

Both exceptions require the statements to be contemporaneous with an event and be spontaneous without time for reflection. In this case the Rule of completeness is critical both to analyze the claim of an excited utterance and to understand the context of what was occurring. Mr. Kohberger has maintained his innocence; thus the time frame the State alleges is very much at issue.

The Rule of completeness is about fairness in proceedings. This Rule recognizes that context is key in understanding evidence. Idaho has captured the common law rule of completeness in Idaho Rule of Evidence 106:

> "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time."

The State is seeking a select portion of phone records to come in at trial under exceptions to the rule against hearsay. First, the court must be aware of the excluded portions of the phone records, and second, Mr. Kohberger asserts the full record must be made available.

> "[W]when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402." *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 172 n.14 (1988).(*See 1 J. Weinstein & M. Berger, Weinstein's Evidence* ¶ *106[02], p. 106-20 (1986))*

Mr. Kohberger herein provides a more complete, but not exhaustive view of DM and BF's communications and interactions with social media during the hours established by the state. (Objection to State's MIL: texts, Exhibits 1 and 2, DM and BF phone record for phone activity during the State's timeline)

November 13, 2022:

2:10:29 DM text to EG (Uber Driver) inquiring if he was driving.

2:13:00 EG text to DM confirming he was driving.

2:53 MM calls BF

3:51:03 DM creates a new contact in her phone.

4:19:07 BF calls DM

4:20:00 DM calls XK

4:20:20 DM calls KG

4:20:28 DM calls BF for 41 seconds

4:21 BF calls XK

4:21:50 DM calls MM

4:22 BF calls MM

4:22 BF calls EC

4:22:08 DM to BF: "No one is answering"

4:22:11 DM to BF: "I'm rlly confused rn."

4:22:42 DM to KGs: “Kaylee”

4:22:43 DM to KG “What’s going on”

4:23 BF outgoing message (snapchat)

4:23:15 BF to DM “Ya dude wtf”

4:23:28 BF to DM “Xana was wearing all black”

4:23:33 DM to BF “I’m freaking out rn”

4:23:42 DM to BF “No it’s like ski mask almost”

4:23:48 BF to DM “Stfu”

4:23:51 BF to DM “Actually”

4:23:52 DM to BF “Like he had soemtbinf over is for head and little nd mouth”

4:24:00 DM to BF “Bethant I’m not kidding o am so freaked out”

4:24:07 BF to DM “So am I”

4:24:11 DM to BF “phone is going to die fuck”

4:24:14 BR to DM “Come to my room”

4:24:22 BF to DM “Run”

4:24:27 BF to DM “Down here”

4:24:39 DM calls EC

4:24:58 DM to BF

4:25:16 BF to DM

4:27:11 DM outgoing call

4:27:30 DM outgoing message (snapchat)

4:27:40 DM outgoing message (snapchat)

4:27:47 DM calls KG

4:28:44 DM calls XK

4:29 BF calls MM

4:30 BF calls MM

4:30 BF calls KG

4: 31 BF calls KG

4:32:57 DM texts KG

4:34 BF accessed snapchat

4:37 BF accessed Instagram

7:30 BF calls dad

8:00 BF calls dad

8:00 BF calls another number

8:01 BF calls home

8:02 BF calls mom

8:09 dad calls BF

8:05:43 – 10:00:45 DM on Instagram

8:41-8:42 BF takes photos

9:04:36 mom texts BF

10:00:56 – 10:01:40 DM messages, incoming and outgoing (snapchat)

10:01:53 – 10:03:05 DM on Instagram

10:03:30 – 10:04:02 DM on Indeed

10:04:54 – 10:23:02 DM messages, incoming and outgoing (snapchat)

10:23:23 DM text MM

10:24:01 – 10:25:04 DM on Instagram

10:30:18 – 10:45:43 DM messages, incoming and outgoing (snapchat)

11:21:53 JM texts BF

10:56:49 – 11:29:08 DM on Instagram and messages on snapchat

11:29:27 DM text KG

11:29:41 – 11:32:45 DM on Instagram and messaging on snapchat

11:35:36 DM on Yik Yak

11:36:07 DM on Tik Tok

11:37:36 DM messages (snapchat)

11:39:09 -11:40:14 DM and dad text

11:49 BF calls JM

11:50:55 JM text DM

11:44:06 – 11:50:38 DM on Instagram

11:50:58 DM calls EA

11:51:01 JM texts DM

11:51:07 BF texts JM

11 :51 :33 JM texts BF

11 :51 :36 JM texts BF

11 :51 :40 BF texts JM

11 :51 :47 JM texts BF

11 :53 :52 BF texts JM

11 :53 :53 BF texts JM

11 :53 :55 BF texts JM

11 :54 :57-11 :55 :01 JM texts BF 3 texts

11:54:39 – 11:57:01 DM on Instagram

11 :56 BF calls 911

The State has selected text messaging as excited utterances and present sense impression. The totality of circumstances defeat the state's request. BF and DM texted each other a handful of times and then they were in the same bedroom. They were together with the ability to talk to each other. They were not asleep for 8 hours. The messages the State seeks admission of as exceptions to hearsay began with a call and a message about being confused. After texting each other and unsuccessfully speaking with any of their roommates the pair were together. The state is looking at the messages with the benefit of hindsight. The analysis has to be done in the moment the utterances were made; text messages in this case. DM first claims confusion, then after communicating with BF, claims fear to leave her room. Despite her stated fear of leaving her room she does so and joins BF downstairs. To get to BF's bedroom DM passed the front door of the residence. BF was steps from the front door. Neither of them left the house. Neither of them called friends, family or law enforcement for help. Instead, both have a substantial amount of activity beginning in earnest less than 4 hours after DM made her way to BF's room. BF and DM communicate with friends and parents and DM is on social media.

The second grouping of message the State claim fit within the exception to the hearsay rule are those from DM to her roommates beginning at 10:23 a.m., 6 hours later. The State claims DM woke up and realized her roommates had not responded to her earlier texts. The State is wrong. DM was awake. She was messaging on Snapchat, she was on Instagram and she text with her dad: and this is not an exhaustive list of activity on her phone. She was with BF who was also communicating with her parents and then later friends.

Mr. Kohbeger urges the court to view the state's request with consideration of the complete picture. The State has asked the court to look at a timeline and Mr. Kohberger urges the court to look at everything that occurred during the timeline. The State's motion should be denied.

DATED this ___17____ day of March, 2025.

ANNE C. TAYLOR
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**CERTIFICATE OF DELIVERY**

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the ___17____ day of March, 2025 addressed to:

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